United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-6005

B P/S

To Be Argued By
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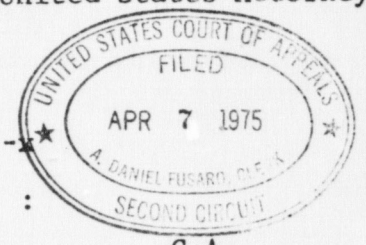

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CHELSEA NEIGHBORHOOD ASSOCIATIONS, et al.,

Plaintiffs-Appellees,

v.

UNITED STATES POSTAL SERVICE, et al.,

Defendants-Appellants.

C.A. Docket No. 75-6005

REPLY BRIEF FOR APPELLANTS

Appeal From An Order Of
Preliminary Injunction Of
The District Court For The
Southern District of New York

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REPLY BRIEF FOR APPELLANTS

This reply brief is submitted on behalf of the appellants United States Postal Service and E. T. Klassen, pursuant to F. R. App. P. 31(a), in reply to appellees' brief in opposition.

ARGUMENT

POINT I: THE POSTAL SERVICE IS EXEMPT FROM NEPA BY VIRTUE OF 39 U.S.C. § 410

Despite appellees' generalized arguments about [redacted] NEPA's purposes, NEPA as applied to this case, does fall within the 39 U.S.C. § 410 exemption and the Postal Service need not prepare an environmental impact statement in order to proceed to construction of the VMF. 39 C. F. R. 755.1(b).

Appellees urge that the Postal Service is not exempt from NEPA because NEPA's "basic thrust is to establish a national policy for the country concerning the environment" as opposed to being "directed to public contracts or works as such" (Appellees' Brief at 21). Appellees' argument entirely misses the point that if NEPA were applied to the VMF, NEPA would be directed to a federal action consisting of public and federal contracts, property works officers, employees budgets and funds; indeed most federal projects to which NEPA applies can be so described.

Moreover, appellees' argument misstates the effect of section 410 on non-postal laws and ignores the relationship between section 410 and the rest of the Postal Reorganization Act. Appellees misstate section 410's purpose by reference to the Senate Report No. 91-912 set forth in Appellants' Brief at 24. Removing the Postal Service from the labyrinth of Postal laws -- plainly a primary goal of Title 39 -- was accomplished by enacting the Postal Reorganization Act. But Congress was not satisfied to simply repeal preexisting postal laws to insure postal efficiency because many of the restrictions which hampered postal

efficiency were not in the postal code. Thus Congress included the section 410 exemption in the Postal Reorganization Act.

Both appellees and the District Court ignore the vital role which section 410 plays in relation to the other portions of the Postal Reorganization Act. Section 410(a) provides that "the exercise of the powers of the Postal Service" shall not be fettered by federal laws dealing with contracts, property, works, etc.. The phrase "exercise of the powers" refers to Postal Service actions pursuant to Title 39. See generally 39 USC §§ 101, 401, 403, 404, 1001, 1003, 2005, 2008, 3621, 3641. The particular powers relevant to the instant appeal appear at 39 USC §§ 101(g), 401(2),(3),(5),(6),(10), 403(b)(3), 404(3), 2003(a), 2008(c).*

While it is true that by NEPA's terms public laws are to be interpreted in accordance with NEPA's policies "to the fullest extent possible," NEPA was enacted prior to passage of the Postal Reorganization Act. The phrase "to the fullest extent possible" cannot extend NEPA's requirements to the Postal Service in light

* Thus, the promulgation of 39 CFR § 7551.2 is within the scope of the proper exercise of Postal Service authority under 39 USC § 401(2). To the extent that Judge Ward found that the Postal Service failed to comply

with NEPA, those matters have been specifically delegated to the discretion of the Postal Service under 39 USC §§ 401(3),(4),(5),(6) which grant the Postal Service "general powers ... (2) To adopt ... such rules ... as it deems necessary to accomplish the objectives of this title; (3) To enter into and perform contracts and determine character and necessity for expenditures; (4) To determine ... contents of its contracts"; (5) To acquire ... real property, ... as it deems necessary; ... to hold, maintain, sell, lease, or otherwise dispose of such property ... (6) To construct, operate, lease and maintain buildings, facilities, equipment, and other improvements on any property owned ... by it ...; (10) To have all other powers incidental, necessary or appropriate to the carrying on of its function or the exercise of its specific powers." The Postal Service's powers with respect to facilities are set forth in 39 USC §§ 101(g), 403(b)(3). It should be noted that section 101(g)'s concern for the postal environment pertains to healthful working conditions for postal employees as to which appellees have no standing. See Berry v. Housing and Home Financing Agency, 340 F.2d 939 (2d Cir 1965).

of section 410 and the specific statutory grants cited above.* As noted, those grants delegate full authority to the Postal Service's discretion in the area of construction and operation of postal facilities. To the extent that the District Court imposed restraints not found in Title 39 on the Postal Service's exercise of its powers in proceeding to construction of the VMF, it was in error and must be reversed.

The District Court and appellees draw an incorrect inference from the fact that the laws made applicable to the Postal Service by section 410(b) specifically deal with contracts, unlike NEPA. In addition to subsection (b), section 410 (c) and (d) permit application of other federal laws to the Postal Service. Similarly 39 U.S.C. §§ 1005, 1209, 2003(c)

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* Moreover, that phrase must be juxtaposed to NEPA's other broad directive that it be applied "consistent with other essential considerations of national policy." (42 USC § 4331(b)). In this context, it is significant that the Noise Control Act, which similarly provides that federal agencies should further the programs of the Noise Control Act "to the fullest extent consistent with their authority under Federal laws ..." contains the additional specific reference to the Postal Service which the appellants claim is necessary to overcome the section 410 exemption. (Pub. L. 92-574 §§ 3(10), 4(a)).

(second sentence), 5201 et seq. and 5401 et seq. also call for application of other federal laws to the operation of the Postal Service. More recently the 1972 Equal Employment Opportunity amendments pertaining to officers and employees were specifically made applicable to the Postal Service (section 717 of the Civil Rights Act of 1964 as amended by Pub. L. 92-261, 42 USC § 2000e-16 (Supp. II, 1972)) while the provisions of government contracting were not made applicable (section 718 of the Civil Rights Act of 1964 as amended by Pub. L 92-261, 42 USC § 2000e-17 (Supp. II, 1972)). See also pp. 29, 35 of Brief For Appellants. This extensive list of public laws which Congress has determined should and should not apply to the Postal Service leaves little doubt that omission of NEPA from the laws that do apply, notwithstanding section 410(a), exempts the Postal Service from NEPA. This becomes particularly evident in view of the Noise Control Act of 1972 Pub. L 92-574, 86 Stat 1234 which does specifically require the Postal Service to comply with its provisions. Section 3(10). By contrast, the proposed amendment to the Postal Reorganization Act which would have made NEPA applicable to the Postal Service (H. R. 9855) was never enacted after it was

referred to the Committee on Post Office and Civil Service. (Cong. Rec. H 7367, August 2, 1973). At the time it was introduced, Representative William J. Keating expressed the uncontradicted view that under the terms of the Postal Reorganization Act, the Postal Service did not have to comply with NEPA. (Cong. Rec. E 5386, August 3, 1973.) See also the Privacy Protection Act, S. 3418 passed by Congress awaiting the President's signature. The Conference Report to that Act explicitly noted that specific reference to the Postal Service was necessary because "section 410(a) of Title 39 in the U.S. Code exempts the Postal Service from legislation generally applicable to Federal agencies, barring a clear expression of Congressional intent to the contrary." Cong. Rec. S. 21819 (daily ed. Dec. 17, 1974).

For these reasons, as well as those contained in the Brief For Appellants this Court should reverse the District Court's holding that NEPA does apply to the Postal Service.

POINT II: THE DISTRICT COURT ERRED IN CONCLUDING THE ENVIRONMENTAL IMPACT STATEMENT WAS INADEQUATE

(A) The EIS Is Adequate for the VMF Alone.

Appellees characterize the Brief for Appellants as lacking in candor in stating that "The District Court opinion upholds none of plaintiffs' arguments below that the EIS is inadequate in terms of its analyses concerning air and noise pollution" (Brief For Appellants at 37). Appellees argue that the District Court merely did not reach this point. A mere reading of the District Court opinion reveals that indeed it did not uphold a single claim made below that the EIS was inadequate with respect to its disclosures of the noise and air impacts from the VMF. Appellees, in effect, want a second bite in the event that this Court disagrees with the District Court's findings on the adequacy of the EIS.

Extensive documentary evidence was submitted below by the Postal Service with respect to the adequacy and accuracy of the EIS' scientific analyses on these issues. (See Appendix Exhs. Q and Q-1). With respect to the air impact, the evidence below was that the EIS accurately analyzed the one-hour and

eight-hour carbon monoxide standards; that appellees' study attacking the EIS (Exhs. X and X-1) was entirely deficient and inaccurate; that the unrefuted fact is that the overall impact of the VMF on the air quality of Chelsea would be small; that there would be improvement of the air quality for Chelsea with or without the VMF; that the rate of improvement would not be significantly different with or without the VMF; and that there would actually be reduced carbon monoxide emissions if the VMF were built. As to noise, Exhs. Q and Q-1 verified that the EIS accurately analyzed in absolute terms the noise level generated by VMF traffic; that the EIS accurately analyzed in comparative terms the impact of VMF on the environment. In fact, the EIS probably overstates the VMF's impact because VMF generated traffic movements were added to prevailing street traffic volumes with the proposed project. Since many of these added movements already occur, there was a "double-counting." In addition the EIS evaluated the noise impacts resulting from construction (EIS at E-2). The evidence further established the inaccuracy of appellees' noise study.

Accordingly, if this Court agrees that the District Court was erroneous in its findings that the EIS was inadequate, appellants request this Court make

explicit that appellees are not entitled to a second bite.* It is plain that the Court's function in NEPA cases is no more than to assure that competing scientific views are properly set forth and not arbitrarily omitted. Committee for Nuclear Responsibility v. Seaborg, 463 F.2d 783 (D.C. Cir. 1971). In light of the evidence below, no hearing is required to determine the reasonableness of the Postal Service's decision to proceed on the basis of the EIS (Exh. "A").**

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* Indeed, at the settling of the order Judge Ward stated: "I would suggest that although the opinion might not be ... aid to cover every conceivable problem in the case which I have here before me, I tried in my opinion to indicate to the parties what in general they should do to comply." (Tr. at 12)

** The ... ment did not request an evidentiary hearing on th... sue of air pollution, nor is one required, because (1) wi... respect to NEPA it was neither necessary nor appropriate, and (2) with respect to the Clean Air Act Claims, plaintiffs' contentions could be disposed of on the motion to dismiss for lack of jurisdiction and failure to state a claim. To the extent that appellees imply an "understanding" that certain factual issues were reserved, there was never any discussion by either party that a hearing would be appropriate on the NEPA claims--with the possible exception over the disputes as to the measurements and alleged conversations concerning the availability of the Yale Express Terminal; the only factual dispute which the government understood to be reserved pertained to the Clean Air Act claims, as distinguished from the adequacy of EIS's disclosure of air and noise impacts.

With respect to the District Court finding and appellees' claim that the cost-benefit analysis will shift were there to be no housing, this Court should remember that only the VMF portion of the project is a Postal Service project. The Postal Service has neither interest (except in the event of reversion) nor responsibility (except as to providing foundations) for the air rights and housing.

Thus, in reaching its decision to proceed to construct the VMF, the Postal Service exercised powers delegated by specific statutory provisions: 39 U.S.C. § 401 which authorizes the Postal Service to determine contracts and expenditures for construction of facilities; and 39 U.S.C. § 101(g) which authorizes the Postal Service to weigh the need for facilities and their costs. There is no issue here whether the Postal Service adequately exercised its powers under Title 39; only whether the Postal Service followed the procedures required of NEPA. Thus even if there were no housing, the Postal Service has already done in substance what NEPA requires it to do, i.e., perform a cost-benefit analysis pursuant to Title 39. The EIS itself contains repeated references to the improvement in

Postal operations with the VMF. And appellees made no showing below at all that the EIS was incorrect in concluding that there will be improvement in postal efficiency if the VMF were constructed. Moreover, NEPA does not permit a court to substitute its judgment of the need of a project in place of the agency's judgment. See Ford v. Train, 364 F.2d 227, 233 (W.D. Wisc. 1972) and cases cited therein. Thus, appellants urge this Court to recognize that it would be improper to enjoin the Postal Service from construction of the VMF solely on this ground.

To the extent that environmental laws require the Postal Service to exercise its powers with caution, it should be noted that the Postal Service has attempted to minimize the environmental impacts of the VMF on the community, with respect to routing and scheduling of vehicle movements, regardless whether housing is constructed or the form it will take.

(B) The Housing Above the VMF Was Congressionally Segmented From the VMF; And the EIS Evaluation of the Housing Was Appropriately Limited.

Appellees attempt to paint a picture of the Postal Service misleading the Congress and the community with false promises that the housing will be built. (Appellees' Brief at p. 31 n. ; 36.) But plainly there is nothing in the record to demonstrate that the

Postal Service ever had any responsibility for the housing, or that the Postal Service gave any assurances of funding which might consequently require the Postal Service to prepare an EIS for the housing, as appellees argue. The legislative history of Pub. L. 92-313 shows that the Morgan Annex project was a compromise solution and that the Postal Service would provide no more than foundation supports necessary for the housing for which it would be reimbursed by the City.

For the reasons stated in Brief for Appellants at 41-54 the housing project is properly segmentable from the VMF portion. The dispute as to whether the VMF predetermines the "configuration" of the housing appears to be in part a problem of semantics. Appellants' point, for which there is unrefuted evidence in the record, is that the size, shape, design, number and height of the housing units is not fixed and is subject to architectural changes in a way which could adequately resolve potential aesthetic, environmental and social problems for the housing. The statement in the EIS concerning the "configuration" of the housing and the architect's

statement as to a "specific high rise complex" concern only placement of the foundations. As specified in the 9(g) statement (Exh. U). "However, these foundation plans do not predetermine the size, shape or design of the residential units or of the towers." If this matter were dispositive of the issue of segmentation then the District Court erred in relying on the extent to which the VMF predetermines housing in holding the two not susceptible to segmentation.

In addition to matters already briefed, the Court is referred to two more cases upholding segmentation, Trout v. Morton, F.2d (9th Cir. Dec. 23, 1974), and Carolina Environmental Study Group v. The United States and U.S. Atomic Energy Commission, F.2d (D.C. Cir. Jan. 21, 1975). The Trout case is particularly appropriate since that Court upheld segmentation of a dam and reservoir project because the second phase would require a separate Congressional appropriation. Here, similarly, a separate application to HUD for funds will probably have to be sought and approved before the housing is built.

The issue here is not, as both appellees and the District Court frame it, whether the housing and VMF are not-segmentable because the EIS considered the two together. Rather the issue is whether EIS properly evaluated the housing given the unique nature of Pub. L. 92-313 and the tentative stage of the housing plans. It should be emphasized that neither appellees nor the District Court have supported their view of non-segmentation by citation to a single case where Congress itself similarly segmented a project.

It is plain that the District Court's holding will require either contingent waiting or sheer speculation of potential alternative designs for the housing; a result antithetical to both Pub. L. 92-313 and the purposes of the Postal Reorganization Act and not required by NEPA.

Appellants contend that the EIS does, in fact, address the substantial social, environmental and economic feasibility considerations bearing on the

decision to proceed with housing on top of the VMF. The level of analysis is consistent with the stage of the housing project design formulation and the intent of NEPA to provide for environmental review of projects at their earliest stages in which meaningful consideration can be given to substantive impacts, even if some design details that might require additional mitigative design measures may still require further resolution.

In addition to the pages of the EIS to which the Court was referred in the Brief for Appellants, additional relevant material is included in the EIS concerning the housing: EIS at page III-31 gives recognition to the advantages and disadvantages of the separated deck level environment in terms of crime control; EIS at III-34 notes that maintenance and delivery access bags for the housing are to be located on Ninth and Tenth Avenues and will not affect VMF operations; EIS at II-28 discusses impacts on school population and utilization; EIS at VIII-24 to 25 discusses health facility uses. Moreover, the EIS did consider the housing related vehicular traffic,

although, at the time, residential parking facilities within the Morgan Annex were planned. In view of this analysis, the District Court was in error to find that the Postal Service acted unreasonably.

(C) EIS Consideration of Alternatives Was Adequate.

The need for a consolidated postal vehicle garage and repair facility adjacent to the new operations center at Morgan Station was determined by the Postal Service pursuant to its statutory authority in Title 39, United States Code, as set forth above. The advantage to postal efficiency for that project was plainly stated in the EIS which was circulated for comments. No comments contradicted the EIS conclusion that postal operations would be improved by construction of the VMF. The only specific alternative to the VMF that was proposed was proferred by plaintiffs after the final EIS was filed. That alternative was shown to be entirely inadequate in the documentary evidence submitted below. (See Exhs. B and B-1.)*

* The Yale Terminal is an operational facility and consists of a leased site which alone would not provide adequate floor space but would require purchase of an adjacent lot on the same block which must then be built upon. Even then, extensive modification of the Yale building would be required. In any event, the Yale building is ten blocks from the Morgan Station.

And the District Court did not find that the Postal Service erred in not considering the Yale Express terminal in the face of appellants' claims that its feasibility remains remote and speculative. See Sierra Club v. Froelke, 359 F. Supp. 1289, 1334 (SD Tex. 1973) citing NRDC v. Morton, 458 F. 2d 827, 836 (9th Cir. 1972).

Furthermore, appellees are simply incorrect in stating that the EIS did not consider the change in traffic circulation resulting from consolidation of now existing scattered facilities. See EIS at III-2.

POINT III: APPELLEES' CLEAN AIR ACT CLAIMS SHOULD BE DISMISSED.

Appellants request this Court to direct the District Court to dismiss the Clean Air Act claims on the ground that the Court has no jurisdiction and the plaintiffs failed to state a claim upon which relief can be granted. The District Court's denial of the appellants' motion to dismiss was made in conjunction with the granting of the preliminary injunction; and these claims formed an alternative basis for plaintiffs' seeking an injunction below. In order to avoid prejudicial delay, should this Court agree that there

has been no violation of NEPA, immediate resolution of these purely legal issues is appropriate and necessary.

With respect to appellants' arguments forwarded in the main brief, this Court should be advised that the United States Supreme Court has granted certiorari in the Kentucky v. Ruckelhaus and Alabama v. Seeber cases, regarding the need for federal facilities to obtain state permits.

As to the claim that the VMF operations will result in violations of the implementation plan, in addition to the arguments and cases cited in the main brief, the Court is referred to the recent decision, Thompson v. City of Chicago, No. 74-C-2105 Environment Reporter, Current Developments, p. 1684 (Feb. 28, 1975) (N.D. Ill. 1975). District Judge Frank J. McGarr dismissed a citizens suit alleging violations of ambient air standards, holding that ambient air quality standards are not "emission standards or limitations" for purposes of Section 304 of the Clean Air Act.

CONCLUSION

For the reasons contained in the Brief for Appellants and the Reply Brief, the order of preliminary injunction should be reversed and the Clean Air Act allegations should be dismissed.

Respectfully submitted,

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Form 280 A-Affidavit of Service by Mail
Rev. 3/72

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

PAULINE P. TROIA, being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 7th day of April 1975 she served two copies of the within govt's reply brief by placing the same in a properly postpaid franked envelope addressed:

Berle Butzel, & Kass, Esqs.,
425 Park Avenue
NY NY 10022

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Pauline P. Troia

Sworn to before me this
7th day of April 1975

Walter G. Brannon

WALTER G. BRANNON
Notary Public, State of New York
No. 24-0394500
Qualified in Kings County
Cert. filed in New York County
Term Expires March 30, 1977